

CEQA & Historical Resources

Historical Resources Workshop

Organized by Humboldt Heritage Professionals
Network

Arcata, Humboldt County

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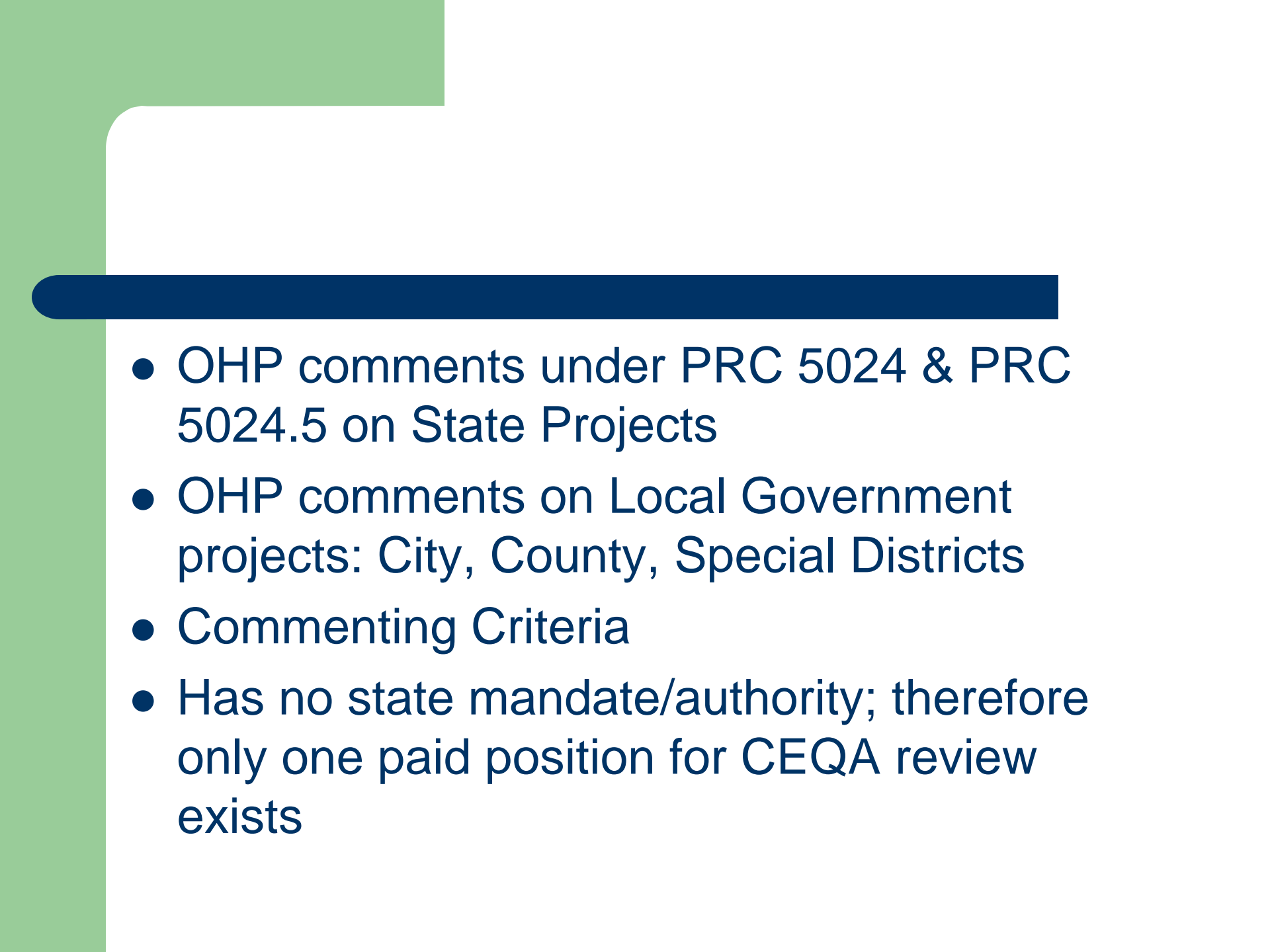
CEQA

Is a PROCESS.....
Some points along its
Way.



OHP's Role

- Is the State's recognized authority on Preservation and Historical and Cultural Resources
- By definition a Commenting Agency under CEQA
- OHP receives in excess of 14,000 CEQA documents annually from SHC

- 
- OHP comments under PRC 5024 & PRC 5024.5 on State Projects
 - OHP comments on Local Government projects: City, County, Special Districts
 - Commenting Criteria
 - Has no state mandate/authority; therefore only one paid position for CEQA review exists

Brief re-cap of CEQA:

- Enacted in 1970, modeled after NEPA
- Law was created to require public agencies decision makers to **document & consider** the environmental implications of their actions
- Applies to **all** governmental agencies at **all** levels in California

CEQA Act

- Authority is codified in Statute §§ 21000-21177, California Public Resources Code
- CEQA Guidelines written by Office of Planning and Research (OPR) 14 Cal. Code Regs. § 15000 et. seq.; the last revision occurred in 1998.
- Biennial Review of Guidelines required by OPR; proposed changes to be recommended to Secretary of the Resources Agency § 21087

Purpose of CEQA

- **Protection of the Environment**
- Was enacted in response to the well-documented failure of state and local governments to consider fully the environmental implications of their actions
- CEQA is to be interpreted liberally “to afford the fullest possible protection of the environment within the reasonable scope of the statutory language”
(Friends of Mammoth v. Board of Supervisors)

CEQA applies to Discretionary projects

- **Project:** any activity which may cause either a direct or indirect physical change in the environment
- Whole of the action which has potential in resulting in either “direct” or reasonably foreseeable indirect physical change
- Project segmenting is not permitted

PRS Section 21065; Guidelines 15378(a)

CEQA has a

- **Substantive** Mandate; it is not just procedural
- Public agencies **must** deny approval of projects with significant environmental effects if “there are feasible alternatives or mitigations measures” that can substantially lessen or avoid those effects

PRC § 21002

CEQA is a Self-Executing Statute

- Public agencies are **entrusted** with compliance of CEQA
- PRC 21005 says non-compliance with information disclosure provision
- Or non-compliance with substantive requirements may constitute a prejudicial abuse of discretion
- CEQA is an integral part of any public agency's decision making process

The Public

- The role of the **public** is to enforce CEQA's provisions, as necessary, through **litigation** and the threat thereof.
- Who can sue under CEQA?
- Private citizens, organizations, and public agencies

- **Expiration of the Limitation Period without the Filing of a Lawsuit Creates the Conclusive Presumption of Adequate CEQA Compliance**

(PRC 21167.2)

BUT:

- **Before** filing a lawsuit, it is required to exhaust the administrative remedies, where such remedies exist, by either presenting orally or in writing, the specific objections to agency decisions in question.

(PRC 21177)

The Parts of the EIR Process

- Initial Study
- Notice of Preparation
- Scoping
- Draft EIR Review
- Responses
- Recirculation
- Certifying the Final EIR
- Findings

Brief General overview of CEQA Process

CEQA begins with :

Phase 1: Preliminary Review whether an
Exemption might apply

Phase 2: Initial Study

Phase 3: **EIR** or **ND** or **MND**

Completes CEQA process

CEQA Exemptions

- Common Statutory Exemptions
 - Ministerial or Emergency Projects
- Categorical Exemptions
 - 33 Classes created in the CEQA Guidelines
- No public review/comment is required for adoption of exemption
- Notice of Exemption (NOE)
 - Optional filing starts 35-day statute of limitations, other wise (180-days)

- Class 31, Exemption per **§ 15331**:
- Projects must conform to the Secretary of Interior's Standards and are
- Limited to repair, rehab, restoration, preservation, reconstruction, maintenance

Exception Rule for Historical Resources

- A Categorical Exemption **shall not be used** when a project will cause substantial adverse change in the significance of an historical resource

EMERGENCY

- is a “**sudden, unexpected occurrence**, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services.”
- “It includes such **occurrences** such as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage.”

Purpose of Initial Study

- If Project is not Exempt, then an Initial Study (IS) must be prepared
- IS Purpose:
 - Facilitate early environmental assessments
 - Decide whether to prepare ND, MND, or EIR
 - IS becomes the supporting decision for ND or EIR
 - Avoid unnecessary EIRs by mitigating impacts
 - Focus an EIR on significant effects

Types of Environmental Impacts

- Direct Effects
- Reasonably foreseeable indirect effects
- Growth-inducing effects
- Cumulative effects

Threshold for Preparing EIRs: Fair Argument Standard

An EIR must be prepared when it can be:

- Fairly argued,
- Based on substantial evidence,
- In light of the whole record,
- that a project may have a significant environmental effect.

What is Substantial Evidence?

Substantial Evidence is:

- Facts
- Fact-related reasonable assumptions-predicated on facts
- Expert opinion supported by facts

Substantial Evidence is not:

- Argument
- Speculation
- Unsubstantiated opinion or narrative
- Clearly inaccurate or erroneous information
- Socioeconomic impact not linked to physical environmental impact

Negative Declaration (ND)

- Basis for “Neg. Dec.” (ND):
- No substantial evidence that project may result in a significant effect
 - Initial study (IS)
 - Supporting reports/studies
 - Other evidence in record
- Neg. Dec is the agency’s **finding**; the IS supports that finding

Basis for a Mitigated Negative Declaration (MND)

- **Initial Study shows potentially significant impacts, BUT:**
- Revisions in project plans agreed to by applicant before public review would mitigate to below level of significance
- No substantial evidence in record of a significant effect of revised project
- No substantial evidence that mitigation will be inadequate

EIR

- Is required: if Project may have a significant impact on the . Is required to promote the goal of informed decision-making that is the heart of CEQA
- EIR must disclose:
 - project description, environmental setting
 - impacts and mitigations
 - direct, indirect, cumulative, growth-inducing
 - Alternatives to project, including no-project

Legal Standard: Good-faith effort at full disclosure; but perfection not required

- An agency must determine whether the project may have a significant effect based on substantial evidence in light of the whole record
- Again.....the Fair Argument...

Significant Effect

- Significant effect on the environment is defined as a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic and aesthetic significance (§15382)

- Economic or social change by itself shall not be considered a **significant effect** on the environment but a social or economic change related to a physical change may be considered in determining when whether the physical change may is significant

What's the Proper Baseline of Environmental Conditions for Purposes of Measuring a Project's Impacts?



- The **Baseline** will normally be the environmental setting for the project at the time of the Notice of Preparation (NOP)
- A description of the physical environmental conditions in project vicinity and on site
- Assessing impacts of a project to an undeveloped piece of land, impacts should be assessed towards existing rather than some hypothetical future environment

Subsequent or Supplemental EIR

- Subsequent needed EIR if previous EIR requires major revisions, substantial changes resulting in new environmental effects or substantial increase in severity previously identified effects
- i.e. New information that was not known or could not have been known

Required when....

- Mitigation measures or alternatives previously found not to be feasible would, in fact, be feasible and would substantially reduce one or more significant effects but the project proponent declined to adopt them
- Mitigation measures or alternatives that are considerably different from those analyzed in previous document would substantially reduce one or more significant effects, but the project proponent declined to adopt them.

Supplemental & Subsequent EIRs are

- Supplemental EIR needed if revisions are not considered major
- EIRs are subject to same notice & public review requirements as original EIR
- Initial Study should be used to determine whether changes or new information lead to significant environmental effects

Addendum to an EIR

- Must be prepared for a previously certified EIR if Lead or Responsible Agency's role in project is not complete & some changes and additions are needed to the project but none of the conditions triggering a ND, or Subsequent or Supplemental EIR have occurred (§ 15164.a)
- Should be prepared for minor technical project changes with no significant impacts
- No circulation for public review but can be attached to FEIR
- Decision making body is required to consider the Addendum with the FEIR before making decision on project

EIR conclusions

- If an EIR concludes an impact is not significant, EIR should explain basis for its conclusion (Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal. App. 4th 1099, 1111.)
- A bare conclusion unsupported by a factual and analytical basis is not sufficient analysis (Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal. (1988) 47 Cal.3d 376, 404)

What is the Role of an Agency under CEQA:

- Make determination who is lead agency for project
- Adopt CEQA procedures
- Adopt procedures which encourage both the public's **formal and informal** involvement and should be designed to receive and evaluate public comments on environmental issues related to an agency's activities
- Requires lead agency to make an **independent** finding in CEQA process

- CEQA specifically provides that is the public agency, not the EIR, that bears responsibility for making ‘findings’ as to whether ‘specific economic, legal, social, technological, or other considerations’ . . . make infeasible the mitigation measures or alternatives identified in the [EIR], or whether there are “specific” overriding economic, legal, social, technological, or other benefits of the project that outweigh the significant effects on the environment .

(PRC 21002.1(b) (c), 21081 (a))

More on Role of Agency:

- **A Public agency** shall not approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur unless both of the following occur:

(a)

1. Changes or alterations have been required or incorporated which mitigate or avoid significant effect.
2. Changes or alterations are within jurisdiction of another agency who will adopt them.

3. Specific economic, legal, social, technological or other considerations make mitigation or alternation infeasible.

(b) Specific **overriding** economic, legal, social, technological, or other **benefits** of the project outweigh the significant effects on the environment.

PRC 21081

The Public's Role in CEQA Process

IS HUGE :

WHY? The law says
SO.....



Public Participation

- Public involvement essential feature of CEQA (§15201)
- Public enjoys a “privileged position” in the CEQA process according to the California Supreme Court (Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Assn., 42 Cal. 3d 929, 936 (1986))

More on the Public...

- “[A] paramount consideration is the right of the public to be informed in such a way that it can intelligently weigh the environmental consequences of any contemplated action and have an appropriate voice in the formulation of any decision.” (Mountain Lion Coalition v. California Fish & Game Com., 214 Cal. App. 3d 1043, 1051 (1989))

Fair Argument Standard & Substantial Evidence

- **Public** can raise at any time of the environmental review process; will become threshold for an EIR

Case law: (Architectural Heritage Association v. County of Monterey (2004) 122 Cal. App. 4th 1095) the Court made clear that the “fair argument “ standard of review applicable to the preparation of an EIR applies to the question of whether a resource is to be treated as historic for purposes of CEQA

In summary:

- Fair Argument standard applies to the question:
- Whether a resource is historic
- Whether a project will cause a significant impact to the resource

- But, a lead agency must make a determination about historical resources on the basis of factual information, but it does not get to **choose** what the historical resources are

Alternatives

- CEQA requires an EIR to describe a range of reasonable alternatives to a project, or to the location of a project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and to evaluate the comparative merits of the alternatives.
- Discussion must focus on alternatives “which are capable of avoiding or substantially lessening any significant effect of the project, even if such alternatives would impede to some degree the attainment of the project objectives, or would be more costly”

(CEQA Guidelines § 15126.6)

Alternatives

- An EIR must not only identify but discuss alternatives, and this discussion must “contain facts and analysis, not just the agency’s bare conclusions and opinions,” that is, it must provide “meaningful detail” to assist the public in its role. (Laurel Heights Improvement Ass’n of San Francisco v. Regents of the Univ. of California (1988) 47 Cal.3d 376, 404,406)

- “The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.” Citizens of Goleta Valley v. Board of Supervisors (Goleta I) (1988) 197 Cal.App. 3d 1167, 1181)

Lead Agency Response to Comments

- **Must** respond in Final EIR to comments received during DEIR public review period and extensions
- **Must** consider and may respond to late comments
- **Must** provide detailed explanations supporting position of significant disputed issues
- **Must** make good faith, reasoned responses, not unsupported conclusory statements

EIR Certification

A Lead Agency must certify that:

- Final EIR has been completed in compliance with CEQA
- Final EIR was presented to decision-making body and reviewed and considered by decision-making body prior to approving project
- Final EIR reflects Lead Agency's independent judgment and analysis

CEQA Guidelines § 15090

Three Possible CEQA Findings

- Project has been changed to avoid or substantially reduce impact magnitude

OR

- Changes to project are within another agency's jurisdiction and such changes have been or should be adopted

OR

- Specific economic, social, legal, technical, or other considerations make mitigation measure or alternative infeasible

Statement of Overriding Considerations

- Is used when approving a project with unavoidable significant impacts
- Includes specific, written statement of reasons supporting approval: economic, legal, social, technological, or other benefits
- Must be supported by substantial evidence in record
- Should be mentioned in NOD

Comment Period

- Lead Agency must consider comments prior to acting on project
- Comments can be submitted during public review period
 - Draft ND or MND: 20- or 30-day period
 - NOP (EIR): 30-day period
 - EIR: 30- or 45-day (60-day) period
- The review period is not the end of the comment period
 - *comments may be submitted until the final action on project*

Notice of Determination

- To be filed within 5 working days of project approval (CEQA Guidelines §§ 15075 and 15094)
- Starts clock (30-days) on Statute of Limitations for CEQA challenge
 - (CEQA Guidelines §§ 15075, 15094 and 15112)
- If NOD was not filed, then statute of limitations is 180 days (CEQA Guidelines § 15062)

Administrative Record becomes the

- Is important for lead agency to document everything
- Becomes Cornerstone for in any judicial review
- The “**Record**” tells the story of the lead agency’s proceedings in connection with CEQA.....

Contact Information

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